NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOHN FRANCIS FRY, Petitioner - Appellant, v. CHERYL K. PLILER, Warden, Respondent - Appellee.	No. 04-16876 D.C. No. CV-01-01580-FCD -ST MEMORANDUM[*]

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, District Judge, Presiding

Argued and Submitted October 18, 2005
San Francisco, California

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

After two mistrials on account of hung juries, John Fry was convicted of two counts of first degree murder in California Superior Court.[1] His conviction was affirmed by the California Court of Appeal and the California Supreme Court.

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[1] Because the parties are familiar with the factual and procedural history we do not include them here except as necessary to explain our disposition.

Fry's petition for federal writ of habeas corpus under 28 U.S.C. § 2254 was denied by the district court. We have jurisdiction under 28 U.S.C. § 2253(a) and we affirm.[2]

The exclusion of Pamela Maples' testimony involved an unreasonable application of clearly established federal law, because her testimony was "material and would have substantially bolstered [Fry's] claims of innocence." *Chia v. Cambra*, 360 F.3d 997, 1003 (9th Cir. 2004). Maples did overhear large portions of a conversation involving her cousin, Anthony Hurtz, in which Hurtz indicated that he had committed a double homicide. Because Maples did hear large portions of this conversation—and because the portions of the conversation Maples did hear involved idiosyncratic facts exactly matching the facts surrounding the murder of Cynthia and James Bell, the victims in this case—we find her testimony to be sufficiently reliable. However, even assuming constitutional error, the exclusion of Maples' testimony was harmless because it did not have "a substantial and

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[2] Fry is in custody pursuant to a judgment of a state court. Therefore, the writ of habeas corpus will not be granted unless the state court's adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). We review *de novo* the district court's denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus. *Bailey v. Rae*, 339 F.3d 1107, 1111 (9th Cir. 2003).

injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted).[3]

Second, the exclusion of Robert Morse's testimony was not contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court, because, if admissible at all, the excluded evidence was not substantive evidence of a third party's culpability in the charged homicides. Therefore, Morse's testimony was not of significant importance to Fry's third party culpability defense and its exclusion was not constitutional error. *See Chia*, 360 F.3d at 1004. Assuming constitutional error in excluding Morse's testimony, that error was harmless because it did not have a substantial and injurious effect on the outcome of the trial. *Brecht*, 507 U.S. at 637.

AFFIRMED

[3] Fry contends that this court should not apply the *Brecht* harmless error standard because the state appellate court failed to conduct a meaningful prejudice review. We have held, however, that the *Brecht* standard applies uniformly in all federal habeas corpus cases under § 2254 regardless of the error standard, if any, applied by the state court. *Bains v. Cambra*, 204 F.3d 964, 976 (9th Cir. 2000); *see also Inthavong v. LaMarque*, 420 F.3d 1055, 1059 (9th Cir. 2005).